AMENDED THIS July 17/19 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À
☐ RULE/LA RÈGLE 26.02 ( )
☑ THE ORDER OF L. Perell
L'ORDONNANCE DU
DATED / FAIT LE July 26, 17
REGISTRAR
SUPERIOR COURT OF JUSTICE
GREFFIER
COUR SUPÉRIEURE DE JUSTICE

Court File No.: CV-16-560268-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF a Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, C. 6

BETWEEN:

ARLENE MCDOWELL

Plaintiff

- and -

FORTRESS REAL CAPITAL INC., FORTRESS REAL DEVELOPMENTS INC., EMPIRE PACE (1088 PROGRESS) LTD., BUILDING & DEVELOPMENT MORTGAGES CANADA INC., ILDINA GALATI, DEREK SORRENTI, SORRENTI LAW PROFESSIONAL CORPORATION, OLYMPIA TRUST COMPANY and MICHAEL CANE

Defendants

FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT(S):

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff' lawyer or, where the Plaintiff do not have a lawyer, serve it on the Plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

REQUEST TO REDEEM

Whether or not you serve and file a statement of defence, you may request the right to redeem the mortgaged property by serving a request to redeem (Form 64A) on the plaintiff and filing it in this court office within the time for serving and filing your statement of defence or at any time before being noted in default. If you do so, you will be entitled to seven days' notice of the taking of the account of the amount due to the plaintiff, and to 60 days from the taking of the account within which to redeem the mortgaged property.

If you hold a lien, charge or encumbrance on the mortgaged property subsequent to the mortgage in question, you may file a request to redeem, which must contain particulars of your claim verified by an affidavit, and you will be entitled to redeem only if your claim is not disputed or, if disputed, is proved on a reference.

REQUEST FOR SALE

If you do not serve and file a statement of defence, you may request a sale of the mortgaged property by serving a request for sale (Form 64F) on the plaintiff and filing it in this court office within the time for serving and filing your statement of defence, or at any time before being noted in default. If you do so, the plaintiff will be entitled to obtain a judgment for a sale with a reference and you will be entitled to notice of the reference.

If you hold a lien, charge or encumbrance on the mortgaged property subsequent to the mortgage in question and you do not serve and file a request to redeem, you may file a request for sale which must contain particulars of your claim verified by an affidavit, and must be accompanied by a receipt showing that $250 has been paid into court as security for the costs of the plaintiff(s) and of any other party having carriage of the sale.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date Sept 9/16 Issued by S. Ricci
Local Registrar

Address of court office: 393 University Avenue, 10th Floor
Toronto, Ontario
M5G 1E6

TO: **FORTRESS REAL CAPITAL INC.**
25 Brodie Drive, Unit 8
Richmond Hill, ON L4B 3K7

AND TO: **FORTRESS REAL DEVELOPMENTS INC.**
25 Brodie Drive, Unit 8
Richmond Hill, ON L4B 3K7

AND TO: **EMPIRE PACE (1088 PROGRESS) LTD.**
125 Villarboit Crescent
Vaughan, ON L4K 4K2

AND TO: **BUILDING & DEVELOPMENT MORTGAGES CANADA INC.**
25 Brodie Drive, Unit 8
Richmond Hill, ON L4B 3K7

AND TO: **ILDINA GALATI**
25 Brodie Drive, Unit 8
Richmond Hill, ON L4B 3K7

AND TO: **DEREK SORRENTI**
Sorrenti Law Professional Corporation
310-3300 Highway 7
Vaughan, ON L4K 4M3

AND TO: **SORRENTI LAW PROFESSIONAL CORPORATION**
310-3300 Highway 7
Vaughan, ON L4K 4M3

AND TO: **OLYMPIA TRUST COMPANY**
125-9th Avenue SE, Suite 2200
Calgary, AB T2G 0P6

AND TO: **MICHAEL CANE**
401 Bay Street, Suite 2704
Toronto, ON M5H 2Y4

CLAIM

1. The Plaintiff claims on her own behalf and on behalf of all members of the Class (as defined herein):

   a) An Order certifying this proceeding as a class proceeding and appointing the Plaintiff as representative Plaintiff for the members of the Class and any appropriate subclass thereof;

   b) The following relief:

      i) A Declaration that the Defendant Fortress Real Developments Inc. ("**Fortress Developments**") holds its interest in trust for the Plaintiff in an agreement dated on or before August 13, 2012 with the Defendant Empire Pace (1088 Progress) Ltd. ("**Empire Pace**") regarding the Progress Manors (Ten88) ("**Ten88**") project lands in Toronto, Ontario;

      ii) A Declaration that the Defendants Derek Sorrenti ("**Sorrenti**") and Olympia Trust Company ("**Olympia**") henceforth do not act in the capacity as trustees on behalf of the Plaintiff with respect to a syndicated mortgage (the "**Syndicated Mortgage**") registered against the Ten88 project lands;

      iii) Appointment of a trustee or trustees to act on behalf of the Plaintiff with respect to her investment in the Ten88 project;

      iv) Immediate judicial sale of the lands underlying the Ten88 project (more particularly described in Schedule "**A**" herein) pursuant to the provisions of Rule 64 of the *Rules of Civil Procedure*;

      v) An interim Order that all amounts paid to or held by Fortress or any of the Defendants as advances against anticipated profits and commissions be paid

into Court pursuant to the provisions of Rule 45 of the *Rules of Civil Procedure*;

vi) An accounting of all funds received by the Defendants from the Plaintiff and paid by the Defendants to Empire Pace;

vii) Disgorgement of all profits earned by all Defendants who the Court determines are fiduciaries of the Plaintiff with respect to the Ten88 project;

viii) An equitable tracing of all funds received by the Defendants from the Plaintiff;

c) In the alternative to subparagraph (b) above, rescission of all agreements between the Plaintiff and the Defendants with respect to her investment in the Syndicated Mortgage;

d) General damages in the amount of $25,000,000;

e) Exemplary, punitive and aggravated damages in the amount of $2,500,000;

f) Pre and post-judgment interest at the rate of 8% per annum pursuant to the terms of the Syndicated Mortgage (as defined below);

g) In the alternative to subparagraph (f) above, pre- and post-judgment interest in accordance with the *Court of Justice Act*, R.S.O. 1990, c. C-43 and the amendments thereto;

h) Costs of this action on a substantial indemnity basis together with the Harmonized Sales Tax thereon; and

i) Such further and other relief as the nature of this case may require and to this Honourable Court may seem just.

Nature of the Action

2. This class action against the Defendants concerns an investment made by the Plaintiff and other members of the proposed class in the Syndicated Mortgage. The Syndicated Mortgage was marketed and sold by the Defendants Fortress Real Capital Inc. ("**Fortress Capital**"), Fortress Developments (the two Fortress Defendants are collectively referred to as "**Fortress**"), Building & Development Mortgages Canada Inc. ("**BDMC**") and other mortgage brokerage firms.

The Parties

3. The Plaintiff, Arlene McDowell ("**McDowell**"), resides in the City of Toronto in the Province of Ontario.
4. Fortress Capital and Fortress Developments are corporations incorporated under the laws of Canada and Ontario respectively with offices in the Town of Richmond Hill. The companies are in the business of real estate development.
5. Empire Pace is a corporation incorporated under the laws of the Province of Ontario with an office in the City of Vaughan. The company is a single purpose company incorporated to own and develop the Ten88 lands and development. Empire Pace is a related company to Fortress.
6. BDMC is a corporation incorporated under the laws of the Province of Ontario with an office in the same location as Fortress in the Town of Richmond Hill. It is a related company to Fortress. One or more of the principals of BDMC is a shareholder of Empire Pace. At the time of the events herein, BDMC was a licensed mortgage brokerage. BDMC also carried on business under the trade name Centro Mortgage Inc.

7. On February 1st, 2018 the Financial Services Commission of Ontario ("**FSCO**") made an Order revoking the mortgage brokerage license of BDMC pursuant to section 19 of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the "***Act***"). BDMC was ordered to pay an administrative penalty of $400,000 pursuant to section 39 of the *Act*.

8. On April 20, 2018, the Ontario Superior Court of Justice appointed a trustee over all the assets, undertakings and properties of BDMC. In addition, all actions against BDMC were stayed and suspended. Accordingly, this action will not proceed against BDMC without the consent of the BDMC trustee or leave of the Court.

9. The Defendant, Ildina Galati ("**Galati**"), is a resident of the City of Vaughan and was a mortgage broker and the principal broker and director of BDMC at the relevant times herein. In January or February of 2018 Galati surrendered her mortgage broker license.

10. Sorrenti is a lawyer licensed to practice law in the Province of Ontario with an office in the City of Vaughan.

11. The Defendant, Sorrenti Law Professional Corporation ("**Sorrenti Law**"), is a professional corporation incorporated under the laws of the Province of Ontario with an office in the City of Vaughan. Sorrenti Law operates Sorrenti's practice of law.

12. Olympia is a trust company incorporated under the laws of the Province of Alberta with its head office in the City of Calgary.

13. The Defendant, Michael Cane ("**Cane**"), is a licensed real estate appraiser with an office in the City of Toronto. He has operated Michael Cane Consultants, a real estate consultancy, since 1999 and also provides real estate consultancy services through Ernst & Young Real Estate Services Inc.

Mortgage Law in Ontario

14. In Ontario, the mortgage brokerage industry is governed by the provisions of the *Act* and its regulations.

15. The mortgage brokerage industry is regulated by FSCO, a regulatory commission established under the provisions of the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28.

16. Sections 2 to 5 of the *Act* requires that individuals and companies be licensed under the *Act* (as a broker or agent in the case of individuals and as a brokerage in the case of companies) in order to:

    a) Solicit a person or entity to borrow or lend money on the security of real property;

    b) Negotiate or arrange a mortgage on behalf of another person or entity;

    c) Carry on the business of dealing and trading in mortgages;

    d) Solicit a person or entity to buy or sell mortgages;

    e) Buy or sell mortgages on behalf of another person or entity;

    f) Lend money on the security of real property; or

    g) Hold themselves out as lending money on the security of real property.

17. The *Act*'s regulations set out high standards of practice for mortgage brokerages, principal brokers, brokers, agents, mortgage administrators and brokerage officers and directors.

18. The *Act* codifies much of the previous common law with respect to the duties of mortgage brokerages, principal brokers, brokers, agents, mortgage administrators and brokerage officers and directors.

Background of Fortress and Its Business

19. The following facts apply generally to all Fortress syndicated mortgages and specifically to the facts of this action.

20. Fortress was founded in 2008 by Jawad Rathore ("**Rathore**") and Vincenzo Petrozza ("**Petrozza**"). Prior to that time Rathore and Petrozza had been active in the securities markets in Ontario.

21. Fortress enters into development agreements with developers/builders whereby Fortress promises to provide real estate financing for the developments in return for a profit participation of 50% in the development project.

22. To finance the projects, Fortress raises capital predominantly from small and unsophisticated investors who invest in syndicated mortgages. These mortgages are registered against the land underlying the planned real estate developments.

23. The two companies, Fortress Developments and Fortress Capital, are used interchangeably in the various transactions although it appears Fortress Developments is primarily responsible for the business transactions with developers/builders and Fortress Capital is primarily responsible for the raising of investment capital.

24. Both Fortress companies share office space, management and staff and capital is pooled by the two companies.

25. The investments are formally sold to investors by BDMC as Fortress is not licensed under the *Act*. Investors often never meet with BDMC or any of its agents prior to making their investment decision.

26. Fortress has developed a network of mortgage brokers and agents to sell its mortgage investments. Fortress has an agreement with three mortgage brokerage firms, FFM

Capital Inc., FMP Mortgage Investments Inc. and FDS Broker Services Inc., to market the mortgage investments widely to other mortgage brokers and agents who, in turn, solicit interest in the Fortress investments.

27. Fortress develops professional sales and marketing packages that are circulated widely to its network of mortgage brokers and agents. The packages are also circulated directly to members of the public.

28. Potential interested investors are invited to seminars organized by Fortress, BDMC and the mortgage brokers/agents.

29. In the marketing materials and at the seminars, the real estate projects are presented as large scale developments with blue-chip, established and reputable builders with decades of experience.

30. The syndicated mortgages are marketed as safe and secure investments that provide monthly interest payments at an 8% annual rate. Also, investors are told they will have the opportunity to earn additional profits when the real estate project is complete.

31. The investments are marketed as registered plan-eligible and safe and secure for retirement and savings investment. Registered plans include Registered Retirement Savings Plans ("**RRSP**"), Registered Education Savings Plans ("**RESP**") and Tax Free Savings Accounts ("**TFSA**").

32. The amounts raised by Fortress in the syndicated mortgages are formally lent to the developers through a loan agreement executed by a trustee such as Sorrenti and Olympia acting on behalf of investors.

33. During the life of the syndicated mortgages, they are administered on behalf of investors by BDMC or Sorrenti. In this case, Sorrenti was the mortgage administrator.

Olympia Doing Business in Ontario

34. FSCO is responsible for the licensing of trust companies pursuant to the provisions of the *Loan and Trust Corporations Act*, R.S.O. 1990, c. L-25 (the "***LTCA***").

35. Olympia is licensed as a trust company under the laws of the Province of Alberta.

36. In 2011 and again in 2013, Olympia sought a license from FSCO to operate as a trust company in the Province of Ontario so as to offer registered plans to investors in the province who wished to invest in syndicated mortgages.

37. In seeking a license, FSCO had the assistance of Fortress' counsel, Norton Rose Fulbright Canada LLP ("**Norton Rose**"). This law firm also provided Olympia with a tax opinion that the Syndicated Mortgage was in compliance with the rules set out by the Canada Revenue Agency ("**CRA**") with respect to investment of funds held in registered plans into syndicated mortgages.

38. Olympia's purpose in seeking to do business in Ontario was to partner or joint venture with Fortress to facilitate registered plan investments in Fortress syndicated mortgages. This was in both parties' mutual interest:

    a) For Fortress, its syndicated mortgage business in Ontario was only viable if money could be raised from holders of registered plans. No other trust companies or financial institutions licensed to do business in Ontario would permit registered plan clients to invest in Fortress syndicated mortgages through their plans.

    b) 80-85% of the money invested in Fortress syndicated mortgages is raised through holders of registered plans. If the holders of those plans could not invest in Fortress syndicated mortgages, the pool of available non-registered plan

investment funds would not have been large enough to support Fortress' syndicated mortgage business.

c) For these reasons, it was essential for Fortress that Olympia do business in Ontario to invest money on behalf of registered plan holders in Fortress syndicated mortgages.

d) For Olympia, it allowed it to grow its customer base and earn substantial fees from Ontario residents who opened registered plan accounts.

39. FSCO refused to license Olympia in Ontario holding that sections 31 and 213 of the *LTCA* only permitted federally-incorporated trust companies to be licensed to do business in Ontario. Olympia refused to obtain a federal charter.

40. Notwithstanding FSCO's refusal to provide it with a license and its knowledge that it could not legally carry on business in Ontario, after being turned down for a license in Ontario, Olympia proceeded to do business in Ontario and opened registered plan accounts for all Fortress syndicated mortgage investors who wished to invest through their registered plans.

41. Fortress was fully aware that FSCO had turned down Olympia's application to do business in Ontario and that Olympia had moved forward with its Ontario business. Other Defendants (discussed below) were also aware of these facts.

42. FSCO required that Olympia cease doing business in Ontario in August 2017.

Lack of Disclosure of Significant Information

43. Fortress' agreements with developers/builders call for advance payments to Fortress of "anticipated profits" at the time financing is raised. This results in a substantial portion

of an investor's money (approximately 35%) being retained by Fortress years before any profits are actually earned.

44. The funds retained by Fortress are also used to pay broker and agent commissions and to pay for independent legal advice ("**ILA**") allegedly provided to investors.

45. Upon an investment being made, the various mortgage brokers and agents (including referring brokers, agents and others) share a commission of 15%. This is significantly higher than traditional commissions paid in the mortgage industry.

46. Investors in the syndicated mortgages sign documentation acknowledging they have received ILA with respect to their investment. Investors are advised by Fortress that Fortress can provide a lawyer to give "free" ILA. If the investor wishes to use their own lawyer, the investor is told they are responsible for the lawyer's fees.

47. Most if not all investors accept this offer of "free" ILA so as to save the cost of paying for the ILA. In this case, the ILA is usually provided by Sorrenti and others employed by Sorrenti Law who are paid by Fortress (and the borrowing developer) for this service.

48. The investor does not meet with the lawyer providing independent legal advice. The advice is provided on the telephone with the mortgage agent who was involved in obtaining the mortgage investment present for the call.

49. This ILA is neither independent nor is it legal advice. It is not provided in accordance with the Rules of Professional Conduct as established by the then Law Society of Upper Canada.

50. If the investor decides to proceed with the investment, Sorrenti acts as their lawyer in closing the transaction.

51. Fortress also retains another 16% of investor funds to pay investors their "interest" over the first two years of the loan. This means investors are paying themselves their own "interest" from the capital they invested. This is contrary to the provisions of the *Act* and regulations which state that interest on mortgages is to be paid by the borrower.[1]

52. The result is that the developer receives less than 50% of the funds raised from investors for use in the development of the project itself.

53. FSCO requires that investors receive an appraisal of the investment property based on its "as is" value.

54. Investors are rarely provided with an appraisal but, if one is provided, it provides an inflated number based on value calculated on a hypothetical future value as if the project was completed. This is not a current appraisal under the standards established by the Appraisal Institute of Canada. Such an appraisal was provided to investors in this action.

55. More often, investors are provided with an opinion of value that is not prepared by a licensed appraiser and which sets out a value based on the project being complete. This is also not a current or "as is" value. Often, the opinion of value is represented as an appraisal in FSCO-mandated disclosure documents given to investors. An opinion of value was provided in this action.

56. The inflated appraised value prepared for Fortress is used to determine the loan to value ratio ("**LTV**") for the property. All encumbrances against the property are divided by the value of the property. The higher the value of the property, the lower the LTV ratio.

57. A low LTV ratio is important because CRA requires that a mortgage may only be held by a registered plan if the LTV is less than 100%. Had Fortress used the true value of the

[1] Section 23 of Regulation 189/08

development properties rather than inflated values, none of the syndicated mortgages would have been registered plan eligible.

58. None of the facts set out at paragraphs 43-57 herein are disclosed to investors. Nor were investors in registered plans advised that Olympia was not licensed to do business in Ontario.

59. The Plaintiff pleads that if these facts had been disclosed to investors, none would have invested in the syndicated mortgages.

The Ten88 Project

60. Empire Pace was incorporated in 2012 for the purpose of developing the Ten88 project, a mixed-use development project in Toronto (Scarborough), Ontario encompassing 104 condominium stacked townhouses and 310 condominium apartment units.

61. Empire Pace purchased the land to be used for the development for $8.8 million. Only $2.8 million in cash was paid and the vendor took back a mortgage on the purchase for $6 million (the "**VTB**"). The purchase was registered on title on August 14, 2012.

62. By agreement dated on or before August 13, 2012 (the "**Fortress Agreement**"), Empire Pace agreed to borrow an amount not to exceed $20 million (the "**Development Loan**") from Fortress Developments. Key provisions of the Fortress Agreement were:

    a) The Development Loan was divided into a secured portion and an unsecured portion. The secured portion was to be secured by the syndicated mortgage to be registered against the Ten88 development property;

    b) Fortress Developments assigned its interest in the secured portion of the Development Loan to Sorrenti in Trust and Olympia in Trust. (A separate loan

agreement between these parties and Empire Pace was executed on August 13, 2012, discussed below);

c) Fortress Developments was entitled to 50% of the final profit of the Ten88 development as its consideration for entering into the Fortress Agreement (less certain adjusting amounts);

d) Empire Pace paid Fortress Developments an initial project set-up fee;

e) The term of the Development Loan was three years to August 14, 2015 with an option for Empire Pace to extend the term for a further six months to February 14, 2016;

f) The Fortress Agreement contemplated Fortress Developments retaining 35% of all amounts raised from investors as an advance against anticipated profits and for broker/agent commissions and legal fees; and

g) In addition to the 35% of investors' money withheld by Fortress Developments, a further amount from the funds raised from investors was to be set aside to pay investors two years of 8% interest per year.

63. The result of the Fortress Agreement was that Empire Pace would receive less than 50% of the amounts raised from investors for the actual development of the Ten88 development.

64. By agreement dated August 13, 2012, Empire Pace entered into a syndicated mortgage loan agreement with Sorrenti in Trust and Olympia in Trust on behalf of syndicated mortgage investors (the "**SMLA**"). Key terms of the agreement were:

a) A second mortgage, the Syndicated Mortgage, would be registered against the Ten88 development property as security for the SMLA. This was, in fact, done and registered as Instrument AT3101004 in Land Registry Office #66 in Toronto;

b) The Syndicated Mortgage could be subordinated to construction financing up to the amount of $110 million;

c) The Development Loan was provided for Empire Pace's "soft costs" that would be incurred on the project prior to construction financing being obtained;

d) The term of the Development Loan was three years to August 14, 2015 with an option for Empire Pace to extend the term for a further six months to February 14, 2016;

e) Interest rate was 8% per annum, payable quarterly;

f) Subsection 16(a) of the agreement stated:

> Each of the First Lender [Sorrenti] and the Second Lender [Olympia] covenants and agrees as follows:
>
> a) to postpone and subordinate the [SMLA and supporting security] in favour of First-Ranking Construction Loan Security and to enter into such standstill agreements as the holders thereof may require;

g) The lenders could earn, under certain circumstances, a project completion fee equal to 12% of the principal of the Development Loan (subject to adjustments) to be paid not later than 30 days after substantial completion of the Ten88 development; and

h) There were certain waivable conditions precedent that had to be satisfied prior to Sorrenti and Olympia making each advance under the Development Loan to Empire Pace.

65. The SMLA was to be administered on behalf of investors by Sorrenti.

66. The result of the Fortress Agreement and the SMLA is that Fortress obtained a 50% interest in the Ten88 development without investing any of its own capital. All capital provided by Fortress was the capital of McDowell and other investors. This fact was not disclosed to investors.

67. Nor did Empire Pace invest capital in the Ten88 development. Its capital was also provided by the investors in the Syndicated Mortgage. This fact was never disclosed to investors.

68. Both Fortress and Empire Pace knew that the Ten88 project would not be completed by the time the SMLA came due in August 2015 or February 2016. This fact was not disclosed to McDowell or other investors.

69. Soon after the execution of the SMLA, Sorrenti agreed with Empire Pace to a standstill provision in the Syndicated Mortgage (in a document registered on title to the Ten88 lands under the heading "Additional Provisions) that would preclude investors from acting upon their security in the event of default unless the construction lender consented or all construction financing had been repaid (the "**Standstill**").

70. Empire Pace obtained construction financing in the amount of $28 million from Meridian Credit Union Limited ("**Meridian**") on or about July 29, 2014, about two years after the SMLA was executed and the Standstill was put in place.

71. Meridian took a mortgage on the Ten88 property. Sorrenti and Olympia postponed the Syndicated Mortgage to the Meridian mortgage. Fortress, BDMC and Empire Pace knew of this postponement and approved of it.

72. The Standstill was not contained in any other document including the SMLA. It was provided to Empire Pace without consideration and with no disclosure, or in the alternative, with inadequate disclosure to investors in the Syndicated Mortgage.

Appraisal

73. Fortress Capital retained Cane to provide an appraisal with respect to the Ten88 property (the "**Appraisal**"). FSCO requires that appraisals be prepared on an "as is" or current value basis.

74. Cane had previously and subsequently done appraisals for Fortress projects.

75. Cane knew that Fortress was a syndicator of mortgages and knew the Appraisal would be used by Fortress Capital (and Fortress Developments and BDMC and others) to raise money from investors for a Syndicated Mortgage on the Ten88 property. Cane knew the Appraisal would be disclosed to investors as required in the Disclosure (defined below).

76. Cane consented to such use of the Appraisal. Any limiting language in the Appraisal with respect to the use that could be made of the Appraisal was waived by Cane.

77. Cane knew that Fortress was making representations to prospective investors that an Appraisal had been carried out on the Ten88 property which could be relied upon as the property's "as is" value. Cane also knew that the Appraisal value was being used in documentation provided to investors including documentation required under the provisions of the *Act*.

78. Cane is a member of the Appraisal Institute of Canada, a self-regulated body that has established professional standards for appraisers known as the Canadian Uniform Standards of Professional Appraisal Practice ("**CUSPAP**").

79. The Appraisal is dated July 5, 2012. It provided a value for the Ten88 property at $16.56 million, almost double the $8.8 million amount the property was purchased for by Empire Pace at roughly the same time.

80. The following excerpt from the Appraisal sets out its effective date:

> "In accordance with your instructions, we have inspected the above property, and made certain investigations and studies for the purpose of expressing our opinion as to its current market value. The purpose of this report is to estimate the market value of the freehold interest in the subject property as of the effective date based on the proposed development as set out in this report". Emphasis added

81. While the Appraisal purported to provide a "current market value" for the Ten88 property and, therefore, qualify as a current appraisal (CUSPAP sections 6.2.5, 7.6.1), basing its value on the proposed development of the property clearly establishes it as a prospective appraisal (CUSPAP sections 6.2.5, 7.6.3).

Opinion of Market Value

82. About six months after obtaining the Appraisal, Sorrenti retained the firm of Legacy Global Mercantile Partners Ltd. to provide an Opinion of Market Value with respect to the Ten88 development (the "**Opinion**").

83. The Opinion is contained in a letter dated January 16, 2013. It is premised on certain assumptions: the successful completion of the Ten88 development, no change in current market conditions and that the Ten88 development is marketed properly. As a result of the assumptions of future events, the Opinion is not a current or "as is" opinion of value.

84. The Opinion arrived at a market value for the Ten88 property of $20 million, 20.7% higher than the value set out in the Appraisal six month earlier.

Capital Raised by Fortress

85. In or about August of 2012 Fortress began its marketing efforts for the Ten88 development.

86. Fortress marketed the project widely to its network of referring mortgage brokers and agents as well as to members of the public. It held seminars for interested investors.

87. Among the features marketed by Fortress were:

    a) The appraised value of the property of $16.56 million.

    b) LTV ratio of 85% (mortgages of $14.076 million/appraisal of $16.56 million).

    c) Quarterly interest payments of 8%.

    d) The term of the Syndicated Mortgage was three years to August 14, 2015 with the possibility of a six month extension of its terms to February 14, 2016.

    e) Sorrenti was a bare trustee for the Syndicated Mortgage.

88. Advances under the Development Loan funded by the Syndicated Mortgage were made in tranches to Empire Pace. McDowell is not aware of the exact amount advanced as Empire Pace did not receive all of the amounts raised under the Syndicated Mortgage due to the amounts withheld by Fortress.

McDowell Invests in the Ten88 development

89. McDowell is 64 years of age (date of birth August 3, 1954) and works in the IT sector. She is a single income earner and is a relatively unsophisticated investor.

90. In order to improve the yield in her RRSP, McDowell wished to invest in mortgages offering higher rates of return.

91. In April of 2012, McDowell met a mortgage agent, Marcel Greaux ("**Greaux**"), with the brokerage firm of the Mortgage Alliance of Canada. Greaux advised McDowell that he could assist her in finding mortgage investments for her RRSP.

92. Greaux advised McDowell to open a self-directed RRSP account. He recommended Olympia. McDowell opened an Olympia account.

93. In August of 2012, Greaux had sent McDowell a document for her to review with respect to the Ten88 development. McDowell reviewed the document and followed up with Greaux with a number of questions, some focusing on the risk of the investments. Greaux answered McDowell's questions and reassured her the investments were safe and secure and low in risk.

94. Greaux showed McDowell Fortress promotional and investment material and emphasized the following factors:

    a) 8% annual rate of return;

    b) If the project was successful, a further success fee;

    c) Three year loan;

    d) McDowell would be on title to the property; and

    e) The investment was safe and secure.

95. Greaux did not discuss any of the risks of the investment with McDowell. The Fortress promotional material did not set out any risks. No risks were brought to McDowell's attention.

96. In reliance upon the representations made to her, both oral and in writing, and the ILA later purportedly provided to her, McDowell decided to proceed with the investment.

97. McDowell would not have proceeded with the investment but for the Misrepresentations (as defined below) made to her by the Defendants.

98. The amount McDowell decided to invest was $25,000 with the investment to be placed in her RRSP with Olympia.

99. As part of their discussions, McDowell told Greaux that she needed to get ILA with respect to the investment. Greaux told McDowell that the advice would be provided to her.

100. An appointment was scheduled for October 5th, 2012 in McDowell's office to sign the Ten88 documents. In attendance were McDowell, Greaux and a notary to witness McDowell's signature and verify her identity. The meeting was for about an hour.

101. The notary brought a letter dated September 18th, 2012 from BDMC and Fortress Capital to McDowell with documents to be signed. The letter confirmed McDowell's investment as "REGISTERED FUNDS, $25,000.00". Nine documents were referred to as enclosed in the letter.

102. During the meeting, the notary made a telephone call to Sorrenti who purported to provide McDowell with ILA on the telephone. Sorrenti briefly described the documents she was signing and asked McDowell if she had any questions.

103. Both Greaux and the notary were present during the telephone call.

104. Sorrenti did not review any of the significant risks of the investment with McDowell. Although he knew or ought to have known of the substantial risks associated with an investment in the Syndicated Mortgage, he did not discuss those with McDowell.

105. Sorrenti also did not advise McDowell that the "advice" he was providing McDowell was not true ILA because Fortress was paying Sorrenti's fees for the advice.

106. The telephone call with Sorrenti lasted approximately 20 minutes. At the conclusion of the call, McDowell advised Greaux and the notary that she was prepared to sign the investment documents.

107. The documents were signed and McDowell's payment for her $25,000 investment in the Syndicated Mortgage was made.

Client Suitability Form

108. Prior to investing, McDowell completed a document entitled Client Suitability Form. It is dated October 2, 2012 and contains details of McDowell's financial position and her desired investment risk profile.

109. McDowell wrote that her risk tolerance was medium (the second lowest category of four) and that her objective in making the investment was income (in contrast to other options such as "aggressive" or "speculation"). She also indicated she "would rather accept a lower rate of return to reduce [her] risk".

110. All of these instructions were ignored in selling McDowell an investment in the Ten88 development, a high risk investment. Although BDMC had no involvement with the sale of the investment to McDowell, as the selling brokerage it was legally responsible for the sale and it too ignored the document's contents.

111. Sorrenti, as the mortgage administrator also had an obligation to advise McDowell the Syndicated Mortgage was not a suitable investment for her and ignored his obligations.

112. Fortress, BDMC and Sorrenti knew an investment in the Syndicated Mortgage was inconsistent with McDowell's risk profile and that their actions in selling the investment to her were contrary to their obligations under the *Act*. [2]

113. McDowell pleads that an investment in the Syndicated Mortgage was not suitable for any investor, registered plan or not, regardless of the investor's risk profile.

Subsequent Events

114. City Council approved the zoning application for development of the Ten88 project in July of 2013. Construction of the Ten88 development commenced thereafter.

115. Empire Pace marketed and sold units in Phase 1 but has never marketed and sold units in Phase 2. This fact has never been disclosed to McDowell or any of the investors in the Syndicated Mortgage.

116. Construction was not nearly complete by the due date of the Development Loan and, accordingly, Empire Pace exercised its right to extend the Development Loan for a further six months past the initial term to February 14th, 2016.

117. On February 5, 2016 BDMC issued a "Memo" with respect to the Ten88 project. The Memo made the following points:

a) The Ten88 project was 75% sold with occupancy expected to begin in the spring or summer of 2017;

b) The Development Loan was to come due on February 10th, 2016; and

c) The SMLA contained provisions in subsections 16(a) to (f) for an "ongoing standstill, subordinate and postponement arrangement".

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[2] Sections 43 and 45 of the *Act*, Sections 4, 12, 18, 24, 25, 26 and 27 of Regulation 188/08, Section 10.1 of Regulation 189/08

118. On April 4th, 2016 BDMC issued another "Memo" that dealt with interest payments and stated that payments after the February 10th, 2016 payment would be accrued and paid to investors along with principal upon completion of the Ten88 project.

119. McDowell's legal position is as follows:

a) The SMLA went into default under section 15 on February 10th, 2016 when the Development Loan was not repaid.

b) While BDMC implied the "ongoing standstill" provisions from sections 16(a) to (f) of the SMLA in the February 5, 2016 "Memo" included the Standstill, the provisions in section 16 of the SMLA do not bind McDowell to the provisions of the Standstill.

c) Nothing in any of the documentation and agreements between McDowell and any of the Defendants provided for a period of interest accrual at any time – before or after the date for repayment of the principal due under the Syndicated Mortgage.

120. Sorrenti and Olympia as the lenders/trustees under the SMLA were entitled and obligated as of February 14, 2016 to take all actions and exercise all remedies available to them as a result of the default of the agreement on behalf of their beneficiary investors.

121. Sorrenti and Olympia took no steps to protect McDowell's interests and act upon Empire Pace's default.

122. McDowell attempted to contact Sorrenti on several occasions by telephone and in writing to determine what steps were being taken by Sorrenti to enforce Empire Pace's default under the Syndicated Mortgage. No response was received.

123. Sorrenti and Olympia have never communicated with McDowell and other investors in the Syndicated Mortgage to determine their instructions with respect to Empire Pace's default under the SMLA.

124. By letter dated September 13, 2016, counsel for McDowell wrote to Sorrenti and Olympia enclosing a copy of the Statement of Claim in this action. The letter terminated Sorrenti's and Olympia's authority to act on behalf of investors in the syndicated mortgage (the "**Termination Letter**").

125. Copies of the Termination Letter were sent to Fortress, BDMC and Empire Pace.

126. The Declaration of the Ten88 condominium corporation was registered on title on December 27, 2017.

127. On January 31, 2018 the Meridian mortgage was discharged.

128. On February 1, 2018 Empire Pace gave a new mortgage to Cameron Stephens Financial Corporation ("**Cameron Stephens**") in the amount of $7 million.

129. Notwithstanding their receipt of the Termination Letter, Sorrenti and Olympia executed documents postponing the priority of the Syndicated Mortgage to the Cameron Stephens mortgage on February 2, 2018.

130. While McDowell had executed documents agreeing to postpone the Syndicated Mortgage to a construction loan, the Cameron Stephens mortgage was not a construction loan.

131. The sales of units in Phase 1 of the Ten88 project have closed. McDowell has received no payments of principal or interest since closing. McDowell is not aware of the full extent of her losses but pleads she will suffer the loss of most if not all of her investment in the Syndicated Mortgage.

Legal Claims

132. McDowell pleads this action is appropriate for certification under the *Class Proceedings Act, 1992*, S.O. 1992, C. 6 in that:

a) This Fresh as Amended Statement of Claim discloses one or more causes of action;

b) There is an identifiable class of two or more persons that would be represented by McDowell;

c) The Fresh as Amended Statement of Claim raises common issues;

d) A class proceeding is the preferable procedure for the resolution of the common issues; and

e) McDowell would fairly and adequately represent the interests of the class, will present a plan for the proceeding that will set out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding and McDowell does not have, on the common issues for the class, a conflict of interest with other class members.

133. The marketing and sales of investments in the Syndicated Mortgage and the ILA given to investors were identical for all investors in that:

a) Sales materials for the Ten88 development were widely distributed and available to all potential investors;

b) The documents investors were required to execute were identical;

c) The representations made to investors with respect to how much they would earn were identical;

d) The Misrepresentations (defined below) were made to all investors; and

e) The ILA was prepackaged and had been planned in advance by Fortress, Sorrenti and Sorrenti Law and was identical for all investors.

Pleadings Common to All or Most of the Defendants

134. The Plaintiff's claims against many of the Defendants are particularized below and are based on:

a) Fraudulent and negligent misrepresentation (and, in some cases, fraud);

b) Negligence;

c) Breach of fiduciary duty;

d) Conspiracy to injure; and

e) Breach of Contract.

135. Fraudulent and negligent misrepresentation (and, in some cases, fraud), negligence and conspiracy to injure require that the Defendant owe the Plaintiff a duty of care. The Plaintiff pleads that the relationship with those Defendants against whom these torts are claimed was sufficiently proximate and the foreseeability of harm if a tort was committed was sufficiently great that those Defendants owed her a duty of care. There were no policy reasons to negate a duty of care.

136. With respect to the requirements of proof for a claim of fraudulent and negligent misrepresentation, the Plaintiff pleads as follows:

a) The Misrepresentations (set out below) constitute the misrepresentations made to the Plaintiff;

b) The Misrepresentations were made in the Ten88 marketing and other materials distributed to and reviewed by the Plaintiff including the agreements signed by the Plaintiff when investing in the Syndicated Mortgage. The Misrepresentations

were also set out in general Fortress marketing materials including information available on the Fortress website. Last, the Misrepresentations were conveyed to the Plaintiff orally by Greaux and during her "ILA" and during Sorrenti's and Sorrenti Law's representation of the Plaintiff;

c) The Misrepresentations were made between the dates of April to October 2012 at the time the Plaintiff reviewed the Ten88 materials and when she had discussions with Greaux and Sorrenti;

d) The Misrepresentations either constituted information that was untrue or it contained information that these Defendants should have but failed to disclose to McDowell. These Defendants knew or ought to have known the Misrepresentations were untrue and contained information that should have been disclosed; and

e) These Defendants acted fraudulently in the manner in which they dealt with the Misrepresentations which induced the Plaintiff to invest in the Syndicated Mortgage. Alternatively, these Defendants acted negligently in the manner in which they dealt with the Misrepresentations, the Misrepresentations were reasonably relied upon by the Plaintiff in investing in the Syndicated Mortgage.

137. To the extent the Plaintiff relies upon breaches of statutory duty in this Fresh as Amended Statement of Claim, the Plaintiff pleads that while these breaches may not support a private cause of action, the Plaintiff relies upon them in support of the particular Defendants' failure to meet their common law obligations to her.

138. The Plaintiff pleads that those Defendants against whom a breach of fiduciary duty is claimed were in a relationship with her of trust and confidence that required them to act

honestly, in good faith, and strictly in her best interests. These Defendants had the ability to exercise some discretion or power to affect the Plaintiff's interests making her vulnerable to their actions.

139. The Plaintiff pleads the actions of these Defendants have caused her to suffer damages. In the case of those against whom claims of breach of fiduciary duty are made, the Plaintiff pleads those Defendants should disgorge any profits earned as a result of their actions.

Fortress Capital and Fortress Developments

140. Fortress's actions amounted to fraudulent and negligent misrepresentation, negligence, conspiracy to injure and breach of contract, all as particularized below in this Fresh as Amended Statement of Claim.

141. In addition, Fortress acted as a mortgage brokerage in selling an investment in the Syndicated Mortgage to McDowell although it was not licensed to do so. As such, it owed McDowell the duties of a mortgage brokerage at common law and under the provisions of the *Act*. McDowell pleads those duties included fiduciary duties.

142. The Plaintiff pleads that since Olympia and Fortress were partners or joint venturers, Fortress is responsible for the actions of Olympia in law.

Fraudulent and Negligent Misrepresentation

143. Fortress' fraudulent and negligent misrepresentations are made up of misrepresentations by Fortress as well as Fortress' failure to disclose material information to McDowell (defined as the "**Misrepresentations**"), all as follows:

a) The misrepresentation that the Syndicated Mortgage was a safe and secure investment when Fortress knew it was a risky investment, unsuited for all investors but particularly for investors with a lower to moderate risk profile. This information was contained in Fortress' marketing materials and was also provided to agents such as Greaux who Fortress knew would communicate the information to investors;

b) The intentional failure to disclose the significant risks associated with a syndicated mortgage to McDowell;

c) The failure to disclose that Fortress would receive advance payments of anticipated profits equal to 35% of the funds invested in the Syndicated Mortgage;

d) The failure to disclose that commissions amounting to 15% of the funds raised would be paid to various brokers, agents and referring parties, substantially higher than normal commissions paid for investments of this kind;

e) The failure to disclose that interest payments to investors would be made from the investors' own capital contrary to the provision of the Act. [3] This led investors who held their interest in the Syndicated Mortgage outside registered plans to pay tax on their own capital as interest;

f) Misrepresentation of the current value of the Ten88 development lands to be $16.56 million and then $20 million when it's true current or "as is" value was significantly lower (likely the $8.8 million paid by Empire Pace for the Ten88 lands in August of 2012);

[3] Section 23 of Regulation 189/08

g) The failure to disclose the Appraisal was not prepared in accordance with the standards set by the Appraisal Institute of Canada as set out in CUSPAP as it did not provide an "as is" or current value of the Ten88 property as required;

h) The misrepresentation that the Opinion was, in fact, an appraisal prepared in accordance with the standards set by the Appraisal Institute of Canada;

i) The misrepresentation that the LTV ratio of the Ten88 property was 85% thus misrepresenting that the investment was legal for registered plans. In fact, the true LTV ratio based on a value for the Ten88 lands of $8.8 million was 160% which meant it was not eligible under CRA rules for investment by registered plans;

j) The misrepresentation that the legal advice provided for investors was true ILA when it was prepackaged and paid for by Fortress;

k) The utilization and promotion of the services of Olympia thus implicitly misrepresenting that Olympia could carry on business in Ontario when it knew Olympia had been turned down for a license to carry on business by FSCO but had unlawfully decided to carry on business in Ontario;

l) The failure to disclose that Fortress and Olympia were partners or joint venturers in order to facilitate registered plan investments in Fortress syndicated mortgages by having Olympia carry on business in Ontario unlawfully;

m) The misrepresentation that the use of the funds was for "soft costs and pre-construction financing" of the Ten88 development without disclosing substantial portions of the funds would be retained as advances to Fortress against anticipated

profits, for payment of interest and to provide equity for the purchase of the Ten88 lands;

n) The misrepresentation as to what financing the Syndicated Mortgage would be subordinated to;

o) The misrepresentation that Fortress and Empire Pace had provided capital to the Ten88 project;

p) The failure to disclose that Fortress, BDMC and Empire Pace were related entities and, as such, there might be a conflict of interest in mortgage brokerage advice given to McDowell with respect to the investment;

q) The misrepresentation that the Syndicated Mortgage would be registered in the investors' own names against the secured property thus conveying a sense of security that did not, in fact, exist;

r) The misrepresentation that the Syndicated Mortgage would be repaid by August 14, 2015 with the possibility of a six month extension to February 14, 2016 when it knew the Ten88 project would not be complete by then and that investors would not be repaid amounts due to them for years after that date;

s) The failure to disclose or disclose properly to investors that the Standstill would be inserted into the Syndicated Mortgage preventing investors from acting upon their security in the event of Empire Pace default or when the Syndicated Mortgage came due unless the construction lender consented to such action or until all construction financing had been repaid;

t) The failure to disclose to investors that if the Syndicated Mortgage was not repaid when it came due, interest payments would stop and could be accrued until the Development Loan was repaid; and

u) The failure to disclose that construction, marketing and sales of units of Phase 2 of the Ten88 development would not commence concurrently with construction, marketing and sales of units of Phase 1 and that Empire Pace had no intention to proceed with construction of Phase 2.

144. Sorrenti would not have postponed the Syndicated Mortgage to the Cameron Stephens mortgage in 2018 without being instructed to do so by Fortress, Empire Pace and BDMC.

145. McDowell pleads the postponement was fraudulent as these Defendants knew the new mortgage was not a construction loan and the Syndicated Mortgage could only be postponed to construction financing, knew that McDowell had issued this action alleging that Sorrenti and Olympia did not have authority to act as her trustees with respect to the Syndicated Mortgage and these Defendants had received the Termination Letter terminating Sorrenti's and Olympia's authority to act on behalf of investors.

Negligence and Breach of Fiduciary Duty

146. The particulars of McDowell's negligence and breach of fiduciary duty claim against Fortress are that:

a) It assumed the duties of a mortgage brokerage under the *Act* when it knew it was not licensed by FSCO as a mortgage brokerage;

b) It introduced the Ten88 investment to McDowell when only a licensed mortgage brokerage was entitled to make such introductions;

c) It failed to take the steps required of a mortgage brokerage to ensure that the Syndicated Mortgage complied with all legal requirements and that proper disclosure of all material risks were made to McDowell; [4]

d) It failed to ensure the investments in the Syndicated Mortgage were appropriate investments for each investor based on the investor's background and risk profile;

e) It marketed and recommended the Syndicated Mortgage as safe and secure investments when it knew they were risky investments not suitable for any investors;

f) It provided or failed to provide the information set out in the Misrepresentations;

g) It failed to ensure McDowell obtained genuine ILA and arranged for ILA that was not truly independent as it was prepackaged and paid for by Fortress;

h) It utilized the services of Olympia when it knew Olympia had been turned down for a license to carry on business by FSCO but had unlawfully decided to carry on business in Ontario; and

i) It approved of the postponement of the Syndicated Mortgage to the Cameron Stephens mortgage in 2018 when it knew the new mortgage was not a construction loan, knew that McDowell had issued this action alleging that Sorrenti and Olympia did not have authority to act as her trustees with respect to the Syndicated Mortgage and had received the Termination Letter terminating Sorrenti's and Olympia's authority to act on behalf of investors.

[4] Sections 5(2), 11(7) and (8), 43 and 45 of the *Act*; sections 4, 12, 18, 24, 25, 26, 27 and 40 of Regulation 188/08

Conspiracy to Injure

147. McDowell pleads that Fortress conspired with BDMC, Galati, Sorrenti, Sorrenti Law, Olympia and Empire Pace to injure by way of unlawful conduct. Particulars of the tort include:

a) Fortress conspired with BDMC and Galati to provide or to omit providing the information set out in the Misrepresentations so as to induce McDowell to invest in the Syndicated Mortgage with the knowledge that had she known of the information in the Misrepresentations, she would not have made the investment;

b) Fortress conspired with Olympia to have Olympia carry on business in Ontario with the knowledge that such business could not be lawfully carried out and with the knowledge that if Olympia did not carry on business in Ontario, no other trust company or financial institution with registered plans would allow investments in the Syndicated Mortgage. Fortress and Olympia knew that an inability to raise registered plan money made the syndicated mortgage business unfeasible as there was not enough non-registered plan money available to support the business;

c) Fortress' and Olympia's conspiracy therefore allowed Fortress to make its syndicated mortgage business viable when it would not otherwise have been viable had Olympia Trust not unlawfully done business in Ontario. It also allowed Olympia to earn significant fees from registered plan holders that constituted the bulk of the company's profits between the years 2012 and 2017;

d) Fortress conspired with Sorrenti and Sorrenti Law to plan in advance the prepackaged "ILA" these Defendants would give to investors which would not disclose or discuss the significant risks associated with the Syndicated Mortgage;

e) Fortress conspired with BDMC, Sorrenti, Olympia and Empire Pace to postpone the Syndicated Mortgage to the Cameron Stephens mortgage in 2018 when they knew the new mortgage was not a construction loan, knew that Sorrenti's and Olympia's authority to act as trustees for investors was being challenged in this action and had received the Termination Letter removing the authority of Sorrenti and Olympia to execute the postponement documents;

f) The conspiracy of Fortress, BDMC and Galati with respect to the Misrepresentations, the conspiracy of Fortress and Olympia with respect to Olympia carrying on business in Ontario, the conspiracy with Sorrenti and Sorrenti Law with respect to the ILA and the conspiracy of Fortress, BDMC, Sorrenti, Olympia and Empire Pace with respect to postponement of the Syndicated Mortgage to the Cameron Stephens mortgage constituted unlawful acts;

g) The conduct was directed towards procuring investment in the Syndicated Mortgage by McDowell and other investors and, in the case of the mortgage postponement, the conduct was directed to prefer the interests of Fortress and Empire Pace over the interests of McDowell and other investors;

h) These Defendants knew that the Syndicated Mortgages were risky investments and that there was a foreseeable possibility they would not be repaid which was not disclosed to McDowell. They also knew that postponement of the Syndicated Mortgage would make the likelihood of recovery under the Syndicated Mortgage less likely; and

i) The Syndicated Mortgage did, in fact, go into default causing damages to McDowell. The postponement of the Syndicated Mortgage also caused damages to McDowell.

Breach of Contract

148. McDowell executed an agreement with Fortress Capital, BDMC, Olympia and Sorrenti entitled the Lender Acknowledgement and Consent Agreement (the "**Acknowledgement**") dated October 5, 2012. Key representations made by Fortress Capital, BDMC, Olympia and Sorrenti in the document included:

a) That McDowell was a client of either Fortress Capital or BDMC and had been introduced to the investment by either Fortress Capital or BDMC;

b) That the Syndicated Mortgage was RRSP-eligible;

c) That prior to advances being made to Empire Pace, an updated valuation of the Ten88 development would be provided to the trustees confirming that the combined value of all registered mortgage security on the Ten88 development did not exceed the most recent valuation of the property;

d) That the current value of the Ten88 lands was $16.56 million;

e) That McDowell had received ILA with respect to her investment in the Syndicated Mortgage.

149. McDowell pleads that Fortress' execution of the Acknowledgement with these statements were contractual misrepresentations in that Fortress knew:

a) McDowell could not be a client of Fortress as Fortress had not been licensed as a mortgage brokerage under the *Act* and could not have McDowell as its client;

b) That the Syndicated Mortgage could not be RRSP-eligible since it knew that the true LTV ratio of the Ten88 lands with the Syndicated Mortgage exceeded 100% making it ineligible for registered plan investment;

c) That advances would be made to Empire Pace without updated valuations being made to the Syndicated Mortgage trustees;

d) That the current value of the Ten88 lands was significantly lower than $16.56 million; and

e) That McDowell had not received ILA.

Empire Pace

150. McDowell pleads Empire Pace is in default of the provisions of the SMLA in that the agreement came due on February 14, 2016 without repayment of principal and interest due.

151. McDowell pleads she is entitled to a judicial sale of the lands underlying the Ten88 development pursuant to the provisions of Rule 64 of the *Rules of Civil Procedure* in order to obtain payment of the amounts due to her by Empire Pace.

152. McDowell pleads she has standing in equity to seek relief with respect to Empire Pace's default under the SMLA.

153. McDowell pleads the Standstill is not enforceable against her because the Meridian mortgage has been discharged.

154. McDowell pleads the Standstill is not enforceable against her with respect to the Cameron Stephens mortgage because it is not a construction loan, at the time that mortgage was entered into all parties knew from the issuing of this Statement of Claim that McDowell denied the Standstill had any validity with the issue pending before the

Court of Appeal and that Sorrenti's and Olympia's authority had been revoked by the Termination Letter. It was unreasonable for any party to rely upon the Standstill.

155. McDowell pleads that the Standstill was never valid for the following reasons:

a) It was not disclosed to her at any time including during the provision of ILA. Empire knew or ought to have known the Standstill had never been disclosed to the Plaintiff;

b) The Standstill nullified key provisions of the SMLA such as its payment, term and default sections. Even if some disclosure of the Standstill was provided, such disclosure was inadequate to make it clear to McDowell the Standstill negated these key provisions of the SMLA;

c) While different standstill provisions were contained in other documents executed by McDowell, those provisions did not alert McDowell to the extreme provisions of the Standstill;

d) In the SMLA (and in another document executed by McDowell, the Confirmation of Lender's Interest), McDowell agreed to enter into standstill agreements "as the [construction lenders] may require". McDowell pleads this phrase does not bind her to the terms of the Standstill for the following reasons:

i) The language used in the phrase is ambiguous and would not alert McDowell that she was agreeing to standstill provisions as stringent as those set out in the Standstill that were inconsistent with the payment, term and default provisions of the SMLA;

ii) The Standstill was inserted in the Syndicated Mortgage terms two years before Meridian provided construction financing. Therefore, the terms

were not inserted because they were "required" by Meridian. Accordingly, there is no underlying basis for asserting that McDowell agreed to be bound by the terms of the Standstill;

iii) Meridian provided construction financing to Empire Pace about a year before the Syndicated Mortgage came due. It knew or ought to have known the Ten 88 project would not be complete when the SMLA came due.

iv) Meridian also knew Sorrenti was acting as a bare trustee for investors in agreeing to the Standstill. Since a bare trustee has no independent power, discretion or responsibility, Meridian should have insisted Sorrenti obtain the consent of all Syndicated Mortgage investors to the terms of the Standstill;

v) Fortress was Empire Pace's partner in raising capital from investors for the Syndicated Mortgage. McDowell pleads that the terms of the Standstill were inserted into the terms of the Syndicated Mortgage by Fortress. In light of Fortress' breach of its tort, contractual and fiduciary obligations to McDowell, it is inequitable for Empire Pace to be able to rely upon the provisions of the Standstill. McDowell relies upon the provisions of section 11 of the *Partnership Act*, R.S.O. 1990, c P-5;

vi) Fortress was Empire Pace's agent in raising money for the Ten88 project from investors. Fortress' breaches of its duty of care (fraudulent and negligent misrepresentation, negligence and conspiracy to injure), fiduciary duty and contract are legally binding on Empire Pace. For these

reasons, Empire Pace is not legally or equitably entitled to rely upon the provisions of the Standstill;

e) The beneficiary of the terms of the Standstill is Meridian. Only Meridian can seek to enforce its terms; and

f) The Standstill was provided without consideration and is not enforceable.

156. McDowell pleads it was fraudulent and/or negligent for Empire Pace and that Empire Pace conspired with Fortress, BDMC, Sorrenti and Olympia to approve the postponement of the Syndicated Mortgage to the Cameron Stephens mortgage in 2018 when it knew that the new mortgage was not a construction loan, knew that McDowell had issued this action alleging that Sorrenti and Olympia did not have authority to act as her trustees with respect to the Syndicated Mortgage and had received the Termination Letter terminating Sorrenti's and Olympia's authority to act on behalf of investors.

157. Empire Pace's actions were oppressive, unfairly prejudicial and unfairly disregarded the interests of McDowell contrary to the provisions of sections 245 and 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B-16 entitling McDowell to damages.

BDMC

158. BDMC was the selling brokerage with respect to investments in the Syndicated Mortgages.

159. BDMC's actions amounted to fraudulent and negligent misrepresentation, negligence, breach of fiduciary duty, conspiracy to injure and breach of contract, all as particularized below in this Fresh as Amended Statement of Claim.

Fraudulent and Negligent Misrepresentation

160. The particulars of BDMC's fraudulent and negligent misrepresentations are the Misrepresentations alleged against Fortress. References to Fortress therein should be read as references to BDMC.

161. FSCO requires that a document entitled Investor/Lender Disclosure for Brokered Transactions be provided to prospective investors in syndicated mortgages. One dated September 22, 2012 was provided to McDowell (the "**Disclosure**") by or on behalf of BDMC. There were many misrepresentations and omissions in the Disclosure:

a) Failure to advise whether BDMC acted for the lender or borrower or both in the transaction as required;

b) Failure to disclose its relationship with "each party to the transaction" as required;

c) Failure to disclose material risks about the transaction that the investor should consider as required;

d) Failure to disclose actual or potential conflicts of interest that might arise from the transaction as required;

e) That the ILA that the Disclosure advised the investor to obtain and that BDMC knew McDowell was to receive was not true ILA;

f) Failure to disclose that BDMC might receive additional earnings from the Ten88 development as required;

g) Misrepresentation that BDMC had complied with all requirements of the *Act*;

h) Misrepresentation that the "proposed use" of the investment funds was for "Soft Costs & Pre-Construction Financing";

i) Misrepresentation that an appraisal based on an "as is" value of the Ten88 development had been completed with a value of $16.56 million;

j) Misrepresentation that the LTV ratio was 85%;

k) Misrepresentation as to the fees being paid to agents and lawyer;

l) Failure to attach required documents including copies of any existing mortgages, appraisals, agreements of purchase and sale and evidence of Empire Pace's ability to meet the mortgage payments;

m) Misrepresentation that BDMC had provided "all other information an investor of ordinary prudence would consider to be material" to their investment decision; and

n) Failure to include a schedule of funds that had been provided to Empire Pace and were to be provided in future.

162. McDowell pleads it was fraudulent for BDMC to approve the postponement of the Syndicated Mortgage to the Cameron Stephens mortgage in 2018 when it knew that the new mortgage was not a construction loan, knew that McDowell had issued this action alleging that Sorrenti and Olympia did not have authority to act as her trustees with respect to the Syndicated Mortgage and had received the Termination Letter terminating Sorrenti's and Olympia's authority to act on behalf of investors.

Negligence and Breach of Fiduciary Duty

163. The particulars of McDowell's negligence and breach of fiduciary claim against BDMC are that:

a) It failed to take the steps required of a mortgage brokerage to ensure that the Syndicated Mortgage complied with all legal requirements and that proper disclosure of all material risks were made to McDowell;

b) It failed to ensure the investments in the Syndicated Mortgage were appropriate investments for McDowell based on the investor's background and risk profile;

c) It recommended the Syndicated Mortgage to investors when it was not an appropriate investment for any investor as it was not safe and secure and, in fact, was a risky investment;

d) It failed to meet with McDowell personally to ensure it met its obligations under the *Act* in selling an investment in the Syndicated Mortgage to her;

e) It knew that Fortress was selling investments in the Syndicated Mortgage to investors unlawfully since Fortress was not licensed under the *Act* to do so;

f) It failed to provide investors with documents required by FSCO to be provided as set out in the Disclosure;

g) It failed to ensure McDowell obtained genuine ILA and arranged for ILA that was not truly independent as it was paid for by Fortress;

h) It knew McDowell would be utilizing the services of Olympia when it knew Olympia had been turned down for a license to carry on business by FSCO but had unlawfully decided to carry on business in Ontario;

i) It approved of the postponement of the Syndicated Mortgage to the Cameron Stephens mortgage in 2018 when it knew the new mortgage was

not a construction loan, knew that Sorrenti's and Olympia's authority to act as trustees for investors was being challenged in this action and had received the Termination Letter revoking Sorrenti's and Olympia's authority to execute the postponement documents; and

j) It knew it was failing to meet its obligations under the *Act* and its regulations including its failure to properly complete the Disclosure provided to McDowell.[5]

Conspiracy to Injure

164. McDowell pleads that BDMC conspired with Fortress, Sorrenti, Olympia and Empire Pace to commit the tort of conspiracy to injure by way of unlawful conduct.

165. Particulars of the tort are those set out in subparagraphs 147(a), (e) to (i) herein.

Breach of Contract

166. McDowell signed two agreements with BDMC – the Acknowledgement and a Memorandum of Understanding ("**MOU**") dated September 18, 2012.

167. With respect to the Acknowledgement, McDowell relies upon her allegations set out in paragraphs 148-149 herein except that references to Fortress Capital in those paragraphs should be read as references to BDMC.

168. In the MOU, BDMC set out its duties to McDowell as including the following:

- Suitability of the lender
- Know Your Client (KYC)
- Documentation Completion

[5] Sections 5(2), 11(7) and (8), 43 and 45 of the *Act*; sections 4, 12, 18, 24, 25, 26, 27 and 40 of Regulation 188/08

- Merits of the Project
- Risk Disclosure
- Conflict of interest disclosure

169. McDowell pleads that BDMC failed to meet these contractual duties to her and that this breach caused her damages. Had BDMC met its contractual obligations to McDowell, she never would have invested in the Syndicated Mortgage and would not have suffered any loss.

Galati

170. As the principal broker of BDMC, Galati had a statutory duty under the *Act* and its regulations to ensure the company and its brokers and agents complied with the *Act*'s provisions.[6] Galati knew of these obligations but failed to meet them.

171. Galati knew of BDMC's breach of its duty of care (fraudulent and negligent misrepresentation and negligence), breach of contract and breach of fiduciary duty to McDowell, all as set out in paragraphs 160-169 of this Fresh as Amended Statement of Claim.

172. Galati knew BDMC's actions would cause harm to McDowell. As principal broker, she did nothing to prevent those breaches from happening contrary to her statutory obligations.[7] As principal broker, she did nothing to develop policies for BDMC that would prevent those breaches from happening contrary to her statutory obligations.[8]

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[6] Subsections 7(6) and (7) of the *Act*; Regulation 410/07, section 2
[7] Section 2 of Regulation 410/07
[8] Section 3 of Regulation 410/07

173. Galati was, therefore, negligent and in breach of her fiduciary duties as a result of these actions.

174. Galati also conspired with Fortress and BDMC to injure McDowell. Particulars of the conspiracy are set out at paragraph 147 (a), (f) to (i) of this Fresh as Amended Statement of Claim.

Sorrenti and Sorrenti Law

175. Sorrenti provided ILA to McDowell, acted on McDowell's behalf in closing the investment transaction, was the trustee for McDowell for the SMLA and was also the administrator of the Syndicated Mortgage on behalf of investors.

176. The ILA was anything but independent legal advice. In reality, Sorrenti was acting on behalf of Fortress with respect to the Syndicated Mortgage. McDowell pleads that Fortress and Sorrenti (and Sorrenti Law) planned in advance exactly what advice would be given to investors which would not disclose the significant risks associated with the Syndicated Mortgage. The advice was prepackaged and was identical for all investors.

177. Sorrenti's and Sorrenti Law's (with respect to the ILA and acting with respect to the transaction) actions amounted to negligent misrepresentation, negligence, breach of fiduciary duty and breach of contract, all as particularized below in this Fresh as Amended Statement of Claim.

178. In addition, Sorrenti and Sorrenti Law conspired with Fortress to injure McDowell in planning in advance the prepackaged and deficient ILA that would be given to investors and Sorrenti conspired with Fortress to defraud McDowell by postponing the Syndicated Mortgage to the Cameron Stephens mortgage.

Negligent Misrepresentation

179. With respect to the ILA provided by Sorrenti and Sorrenti Law, these Defendants had an obligation to provide advice with respect to the legal risks associated with an investment in the Syndicated Mortgage.

180. McDowell pleads that Sorrenti and Sorrenti Law knew or ought to have known of the Misrepresentations but failed to alert McDowell to the Misrepresentations as part of the ILA being provided. They similarly failed to alert her to these issues in acting on her behalf in closing the investment transaction.

181. As such, this failure amounted to negligent misrepresentations by Sorrenti and Sorrenti Law with respect to the ILA and their representation of her in closing the transaction.

182. With respect to Sorrenti's actions as a trustee, McDowell pleads that under the provisions of section 12 of the SMLA, he was required to satisfy himself with respect to certain conditions precedent before making advances to Empire Pace. Second, under the provisions of the Acknowledgement, Sorrenti was obligated to obtain up to date valuations prior to making advances to Empire Pace. Sorrenti failed in both obligations.

183. Third, Sorrenti knew of the "Memos" written by BDMC. He knew or ought to have known that McDowell was not bound to the terms of the Standstill and that interest could not be accrued instead of paid. He failed to stop BDMC from circulating the "Memo"s and after they were sent, he failed to advise McDowell that these statements were not correct.

184. McDowell pleads that these actions constituted negligent misrepresentations by Sorrenti with respect to his duties as a trustee.

185. With respect to Sorrenti's duties as the Syndicated Mortgage administrator, the *Act* and its regulations require that mortgage administrators be licensed but Sorrenti was not licensed.[9] In addition, Regulation 189/08 issued under the *Act* requires that an administrator:

a) Shall not "give, assist in giving or induce or counsel another person or entity to give or assist in giving any false or deceptive information or document"; [10]

b) Shall respond to all written complaints that he receives with a written response setting out a proposed resolution;[11]

c) Shall not administer a mortgage if he has reason to doubt it is lawful;[12]

d) Shall not act or omit to act if he is being used to facilitate "dishonesty, fraud, crime or illegal conduct";[13]

e) Shall disclose all conflicts of interest he has with respect to the mortgage;[14]

f) Shall not pay funds to investors unless the payment is made from funds provided by a borrower. In fact, interest payments were made from the investors' own capital; [15]

g) Shall establish and implement policies and procedures that are reasonably designed to ensure the administrator acts in compliance with his obligations under the *Act*; [16]

h) Shall establish a process for resolving complaints about the mortgage administration practices;[17] and

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[9] Sections 5(2), 11(7) and (8) of the *Act*
[10] Section 43 of the *Act*
[11] Section 8 of Regulation 189/08
[12] Section 10 of Regulation 189/08
[13] Section 10.1 of Regulation 189/08
[14] Section 20 of Regulation 189/08
[15] Section 23 of Regulation 189/08
[16] Section 25 of Regulation 189/08

i) Shall maintain errors and omissions insurance with extended coverage for fraudulent acts.[18]

186. McDowell pleads Sorrenti by agreeing to act as administrator for the Syndicated Mortgage, represented to her that he would meet his obligations under the *Act* and its regulations.

187. As such, McDowell pleads that Sorrenti's failure to meet his legal obligations under the *Act* amounted to negligent misrepresentations by Sorrenti in his conduct as an administrator.

Negligence and Breach of Fiduciary Duty

188. With respect to the ILA, Sorrenti and Sorrenti Law's obligations were to provide advice with respect to the legal risks associated with an investment in the Syndicated Mortgage. With respect to acting on McDowell's behalf in closing the transaction on her behalf, their duties were to act as a prudent lawyer would in providing advice, taking instructions and finalizing the documentation for the transaction.

189. McDowell pleads that Sorrenti and Sorrenti Law knew or ought to have known that the Misrepresentations materially increased the risks to McDowell of an investment in the Syndicated Mortgage but failed to alert McDowell to the Misrepresentations as part of the ILA being provided. In particular, Sorrenti and Sorrenti Law failed to alert McDowell to the fact that the ILA was not truly independent because it was being paid for by Fortress.

190. Sorrenti and Sorrenti Law similarly failed to alert McDowell to these issues in acting on her behalf in closing the investment transaction.

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[17] Section 26 of Regulation 189/08
[18] Section 27 of Regulation 189/08

191. Sorrenti and Sorrenti Law failed to alert McDowell to the unreasonable provisions set out in the undated Mortgage Investment Direction and Indemnity Agreement (the "**Indemnity**") she executed with Olympia that they knew or ought to have known required her to:

a) Seek ILA as well as tax and other professional advice before deciding to invest in the Syndicated Mortgage. McDowell thought she was obtaining ILA from Sorrenti and Sorrenti Law but this was not, in fact, the case;

b) Acknowledge that it was McDowell's "sole and entire responsibility" to verify, *inter alia*, the Syndicated Mortgage was a "qualified investment" under the *Income Tax Act* (the "***ITA***");

c) Acknowledge that McDowell did not rely upon Olympia in deciding to invest in the Syndicated Mortgage or to advise her whether the Syndicated Mortgage was a suitable investment for McDowell's RRSP; and

d) Acknowledge that McDowell was responsible for the collection of all mortgage arrears and to institute legal proceedings in the event the Syndicated Mortgage went into default notwithstanding that as a minority investor in the Syndicated Mortgage, she might not be able to compel that steps be taken to enforce her legal rights.

192. Sorrenti also failed to advise McDowell that he was in a conflict of interest as a result of his multiple roles as the lawyer acting on McDowell's behalf with respect to the investment, a trustee and administrator for the Syndicated Mortgage as well as the lawyer providing ILA. Sorrenti and Sorrenti Law were also in a conflict of interest because they were truly acting on Fortress' behalf, not the investor's, in providing ILA.

193. As such, Sorrenti and Sorrenti Law were negligent and breached their fiduciary duty in their provision of ILA and in acting on McDowell's behalf in closing the transaction. Had their obligations been met, McDowell pleads she never would have made an investment in the Syndicated Mortgage.

194. With respect to Sorrenti's actions as a trustee, Sorrenti was negligent and breached his fiduciary duty in the following respects:

a) He was in a conflict of interest as a result of his multiple roles as a trustee for the Syndicated Mortgage in addition to his role as the lawyer providing ILA and acting on McDowell's behalf with respect to the investment and administrator for the Syndicated Mortgage;

b) He entered into the Standstill for no apparent reason when it was not in the interest of Syndicated Mortgage investors and it was not "required" by Empire Pace's construction lender;

c) Having decided it was appropriate to enter into the Standstill, he failed to obtain instructions from investors confirming his intentions as he should have done as a bare trustee;

d) He acted as a co-trustee with Olympia when he knew or ought to have known that Olympia was carrying on business unlawfully in Ontario;

e) He knew or ought to have known the investment funds were not being used for "soft costs and pre-construction financing" as represented yet took no steps to prevent such unauthorized use being made of the funds;

f) He failed to meet his obligations under section 12 of the SMLA to satisfy himself with respect to certain conditions precedent before making mortgage advances to Empire Pace;

g) He failed to obtain up to date valuations of the Ten88 property before making mortgage advances to Empire Pace as he was obligated to do under the terms of the Acknowledgement;

h) He failed to prevent BDMC from sending the "Memos" to investors when he knew or ought to have known that McDowell was not bound to the terms of the Standstill and that interest could not be accrued instead of paid;

i) After BDMC sent the "Memos", he failed to advise McDowell that the statements in the Memo were not correct;

j) Once the SMLA went into default, he failed to take steps to enforce investors' security as he was obligated to do under the SMLA's terms;

k) Once the SMLA went into default, he failed to properly inform investors of the default and obtain their instructions as to what steps should be taken to enforce their rights; and

l) He executed the postponement of the Syndicated Mortgage to the Cameron Stephens mortgage in 2018 when he knew or ought to have known the new mortgage was not a construction loan, knew that Olympia's and his authority to act as trustees for investors was being challenged in this action and he knew Olympia and he had received the Termination Letter removing his authority to execute the postponement documents.

195. With respect to Sorrenti's duties as the Syndicated Mortgage administrator, McDowell pleads that Sorrenti failed to meet his statutory obligations as set out in paragraph 187 herein. This constituted both negligence and a breach of fiduciary duty.

Conspiracy to Injure and Fraud

196. McDowell pleads that Sorrenti and Sorrenti Law conspired with Fortress to plan in advance the prepackaged "ILA" Sorrenti and Sorrenti Law would give to investors which would not disclose or discuss the significant risks associated with the Syndicated Mortgage. Particulars of the conspiracy are set out in subparagraphs 147(d), (f) to (i).

197. McDowell pleads that Sorrenti conspired with Fortress, BDMC, Olympia and Empire Pace to commit the tort of conspiracy to injure by way of unlawful conduct in agreeing to postpone the Syndicated Mortgage to the Cameron Stephens mortgage in 2018 when he knew the new mortgage was not a construction loan, knew that Olympia's and his authority to act as trustees for investors was being challenged in this action and he knew that Sorrenti and Olympia had received the Termination Letter removing their authority to execute the postponement documents.

198. Particulars of the tort are those set out in subparagraphs 147(d) to (i) herein.

199. McDowell pleads Sorrenti's postponement of the Syndicated Mortgage to the Cameron Stephens mortgage constituted fraud because he knew he did not have the legal authority to make the postponement.

Breach of Contract

200. Sorrenti's relationship to McDowell was contractual with respect to the ILA, closing the transaction on her behalf and his duties as a trustee. Sorrenti Law's

relationship to McDowell with respect to the ILA and acting on the transaction was also contractual.

201. McDowell executed a document entitled Investment Authority – Form 9D (the "**9D**") dated October 5, 2012 with Sorrenti and Sorrenti Law regarding their retainer to close the investment transaction on her behalf. Sorrenti and Sorrenti Law made the following representations in the 9D:

a) That an "appraisal" of current value had been carried out on the Ten88 property that set its value at $16.56 million;

b) That the LTV ratio for the Ten88 property was 85%; and

c) That the Syndicated Mortgage would be repaid on August 14, 2015 or February 14, 2016 if extended. There was no reference to the Standstill that Sorrenti had executed.

202. These representations in the 9D were untrue which Sorrenti and Sorrenti Law knew or ought to have known. As such, Sorrenti and Sorrenti Law are in breach of contract.

203. Sorrenti was a party to the Acknowledgement. In that document, Sorrenti made the representations set out at paragraph 148-149 herein. These representations were untrue which Sorrenti knew or ought to have known. As such, Sorrenti is in breach of contract.

204. McDowell pleads that had Sorrenti not breached his obligations under the 9D and Acknowledgement, she would not have invested in the Syndicated Mortgage.

205. McDowell and Sorrenti executed a document entitled Declaration of Bare Trust (the "**Bare Trust**") dated September 18, 2012. Key terms of the agreement were:

a) That Sorrenti held McDowell's interest in the Syndicated Mortgage as a bare trustee for McDowell;

b) That Sorrenti would deal with the Syndicated Mortgage "as directed by [McDowell]"; and

c) That Sorrenti would accept "alterations, revocations and amendments to [his] powers" as McDowell might determine at any time.

206. McDowell pleads Sorrenti breached the terms of the Bare Trust as follows:

a) With respect to the Standstill, he knew or ought to have known he should obtain instructions from investors before executing the document;

b) Once the SMLA went into default, he failed to properly inform investors of the default and obtain their instructions as to what steps should be taken to enforce their rights; and

c) He executed the postponement of the Syndicated Mortgage to the Cameron Stephens mortgage in 2018 when he knew or ought to have known the new mortgage was not a construction loan, Olympia's and his authority to act as trustees for investors was being challenged in this action and had received the Termination Letter removing his authority to execute the postponement documents.

207. McDowell pleads that had Sorrenti not breached his obligations under the Bare Trust, she would have taken more effective steps sooner to secure her rights as an investor in the Syndicated Mortgage. Those steps would have improved on the recovery she will otherwise obtain in this action.

Olympia

208. McDowell invested in the Syndicated Mortgage through an RRSP that she held with Olympia.

209. Olympia was a co-trustee with Sorrenti in the SMLA.

210. Olympia's actions amounted to negligent and fraudulent misrepresentation, negligence, breach of fiduciary duty, conspiracy to injure, fraud and breach of contract, all as particularized below in this Fresh as Amended Statement of Claim.

211. The Plaintiff pleads that since Olympia and Fortress were partners or joint venturers, Olympia is responsible for the actions of Fortress in law.

212. McDowell signed the Indemnity when she opened her account with Olympia. Key provisions of the agreement are set out in paragraph 191 herein.

Fraudulent and Negligent Misrepresentation

213. Olympia made one fraudulent and negligent misrepresentation by implication – that it could legally operate its trust business in Ontario - notwithstanding that FSCO had advised Olympia that according to the provisions of sections 31 and 213 of the *LTCA*, Olympia could not do business in Ontario.

214. In the face of this prohibition and its knowledge of its terms, Olympia nevertheless carried on business in Ontario until 2017.

215. McDowell pleads that but for Olympia's actions, she would not have suffered any damages as no other financial institution in Ontario other than Olympia was willing to allow registered plan investments in Fortress syndicated mortgages.

216. Therefore, if McDowell had not been able to invest through her RRSP in the Syndicated Mortgage through Olympia, she would not have been able to invest at all.

217. McDowell further pleads that the Fortress syndicated mortgage business was only viable if investors in registered plans could invest. There was insufficient investment capital outside of registered plans to make Fortress' business viable.

218. Therefore, if holders of registered plans could not have invested in Fortress syndicated mortgages, there would not have been a Fortress syndicated mortgage business to receive investments outside of registered plans.

Negligence and Breach of Fiduciary Duty

219. The particulars of McDowell's negligence and breach of fiduciary duty claim against Olympia are that:

a) It knew or ought to have known that it could not legally operate its trust business in Ontario; and

b) It should not have permitted McDowell to invest in the Syndicated Mortgage if it had acted in accordance with its obligations to McDowell under the provisions of section 27 of the *Trustee Act*, R.S.O. 1990, c. T-23. The investment was not suitable for the following reasons which Olympia knew or ought to have known:

i) The Syndicated Mortgage was a risky investment not suitable for a registered plan and, in particular, not suitable for McDowell. Olympia did no due diligence as required on the investment and relied upon an opinion from Norton Rose which it knew or ought to have known did not accurately state that the Syndicated Mortgage was registered plan eligible under the provisions of the *ITA*;

ii) Olympia did not review McDowell's risk profile to determine if an investment in the Syndicated Mortgage was appropriate for her;

iii) The ILA that McDowell was to or had received referenced in the Indemnity was not true ILA that would alert her to the risks involved with the Syndicated Mortgage and the risks associated with her execution of the Indemnity;

iv) The Appraisal was not a proper appraisal and the "as is" value of the Ten88 lands was not $16.56 million;

v) The LTV ratio for the Ten88 lands was not 85% as represented. The Syndicated Mortgage was not an eligible investment for a registered plan;

c) It never met with residents of Ontario who were opening registered plans to ensure they understood the risks associated with syndicated mortgages in general and the Syndicated Mortgage in particular and the obligations of the investor under the terms of the Indemnity;

d) It failed to instruct its agents who were opening registered plans with Ontario residents about their obligations to understand the risk profile of the investor, explain the risks of syndicated mortgages in general and the Syndicated Mortgage in particular and the obligations of the investor under the terms of the Indemnity;

e) It failed to meet its obligations under section 12 of the SMLA to satisfy itself with respect to certain conditions precedent before making mortgage advances to Empire Pace;

f) It failed to obtain up to date valuations of the Ten88 property before making mortgage advances to Empire Pace as it was obligated to do under the terms of the Acknowledgement; and

g) It executed the postponement of the Syndicated Mortgage to the Cameron Stephens mortgage in 2018 when it knew or ought to have known the new mortgage was not a construction loan, Sorrenti's and it's authority to act as trustees for investors was being challenged in this action and it had received the Termination Letter removing his authority to execute the postponement documents.

220. McDowell pleads that the provisions of the Indemnity do not shield Olympia from its liability for these allegations of negligence and breach of fiduciary duty including its obligations under the provisions of the *Trustee Act*.

221. In the alternative, McDowell pleads that the provisions of the Indemnity should not be enforced as it would be unconscionable to do so in the circumstances.

Conspiracy to Injure

222. McDowell pleads that Olympia conspired with Fortress to carry on business in Ontario with the knowledge that such business could not be lawfully carried out and with the knowledge that if Olympia did not carry on business in Ontario, no other trust company or financial institution with registered plans would allow investments in the Syndicated Mortgage. Full particulars of the conspiracy are set out in paragraph 147 herein.

Breach of Contract

223. Olympia owed McDowell contractual obligations with respect to its actions as the holder of her registered plan and its actions as the co-trustee of the SMLA. McDowell pleads Olympia breached its obligations as follows:

a) It knew or ought to have known that it could not legally operate its trust business in Ontario; and

b) In permitting McDowell to invest in the Syndicated Mortgage, it acted contrary to its obligations to McDowell under the provisions of section 27 of the *Trustee Act*, R.S.O. 1990, c. T-23. The investment was not suitable for the reasons set out in paragraph 219 herein.

224. Olympia was a party to the Acknowledgement. McDowell pleads and relies upon her allegations set out in paragraphs 148-149 herein except that references to Fortress Capital in those paragraphs should be read as references to Olympia.

Cane

225. Cane owed a duty of care to McDowell as an investor in the Syndicated Mortgage.

226. Cane knew that the Appraisal would be used by Fortress Capital, BDMC and others to raise money from investors for the Syndicated Mortgage. Cane consented to such use and waived any language in the Appraisal limiting its use.

227. Cane failed to provide Appendix 2 of the Appraisal containing limiting conditions to Fortress, BDMC and through them to others. As such, Cane is not entitled to rely upon any limiting conditions set out in Appendix 2.

228. In the Appraisal, Cane made the following negligent misrepresentations:

a) That the Ten88 property's current or "as is" value was $16.56 million;

b) That the Appraisal was not providing a current or "as is" value for the Ten88 property in accordance with the standards of the Appraisal Institute of Canada;

c) That the "extraordinary assumptions" made in the Appraisal were consistent with a current or "as is" appraisal prepared in accordance with the standards of the Appraisal Institute of Canada;

d) That reliance upon the profit projections of Fortress and Empire Pace were appropriate practice for an appraisal prepared in accordance with the standards of the Appraisal Institute of Canada;

e) That Phase 1 construction would be complete by June 2014 and that Phase 2 construction would be complete by the end of December 2014;

f) That the construction, marketing and sales of units of Phase 2 of the Ten88 development would commence concurrently with construction, marketing and sales of units of Phase 1 and that Empire Pace intended to proceed with construction of Phase 2; and

g) That the 2012 tax assessment value for the property of $3,712,000 (page 16) as well as the cost of the property to Empire Pace (pages 23 and 26) were not relevant factors to take into account in arriving at the value for the Ten88 property by ignoring those facts in arriving at the Ten88 property's value.

229. In his preparation of the Appraisal, Cane was negligent as follows:

a) He knew or ought to have known that the Ten88 property's current or "as is" value was not $16.56 million yet set that out as the value for the property;

b) He knew or ought to have known the Appraisal was not providing a current or "as is" value for the Ten88 property;

c) He knew or ought to have known an Appraisal to be used in the context of a syndicated mortgage had to set out a current or "as is" value;

d) He knew or ought to have known it was unreasonable to make the "extraordinary assumptions" he did in arriving at a current value for the Ten88 property in the Appraisal;

e) He knew or ought to have known the Appraisal was a prospective opinion of value and that it was misleading to refer to it as a current opinion of value;

f) He knew or ought to have known the Appraisal did not conform to the standards set out for real estate appraisals for syndicated mortgages by the Appraisal Institute of Canada;

g) He knew or ought to have known the Appraisal did not comply with the CUSPAP standards and, in particular, sections 3.1.1, 3.1.2, 3.1.3, 4.1.1, 4.2.1, 4.2.2, 4.2.3, 4.2.4, 4.2.5, 5.2.1, 5.3.1, 6.2.5, 6.2.7, 7.6.1, 7.6.3, 7.8.1, 7.9.1, 7.11.2, 12.31 and 12.32 of CUSPAP;

h) He knew or ought to have known McDowell would rely upon the value set out in the Appraisal;

i) He knew or ought to have known that Phase 1 construction would not be complete by June 2014 and knew or ought to have known that Phase 2 construction would not be complete by the end of December 2014 as set out in the Appraisal;

j) He knew or ought to have known that construction, marketing and sales of units of Phase 2 of the Ten88 development would not commence concurrently with construction, marketing and sales of units of Phase 1 and that Empire Pace had no intention to proceed with construction of Phase 2.

k) He knew or ought to have known it was not reasonable to rely upon without independent analysis Fortress' profit forecast for the Ten88 development of approximately $27.1 million in extrapolating from that a value for the underlying land of $16.56 million (page 5);

l) He knew or ought to have known that the 2012 tax assessment value for the property of $3,712,000 (page 16) as well as the cost of the property to Empire Pace of $8.8 million at the same time the Appraisal was being prepared (pages 23 and 26) were both relevant factors that should have affected the value arrived at for the Ten88 property.

230. McDowell received a copy of the Appraisal prior to investing in the Syndicated Mortgage. She relied upon the Appraisal, and in particular, the value it arrived at for the Ten88 property, in making her investment. Such reliance was reasonably foreseeable to Cane as set out in paragraphs 74-77 herein.

231. Had Cane set out the true current value for the Ten88 property in the Appraisal, McDowell would not have invested in the Syndicated Mortgage as the value would not have exceeded the encumbrances against the property.

Representative Plaintiff and the Class

232. McDowell pleads that but for the actions of the Defendants, she would never have made her investment in the Syndicated Mortgage.

233. McDowell pleads and relies upon the provisions of the following Acts and the Regulations passed thereunder:

a) *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29;

b) *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28;

c) *Loan and Trust Corporations Act*, R.S.O. 1990, c. L-25;

d) *Partnership Act*, R.S.O. 1990, c P-5;

e) *Business Corporations Act*, R.S.O. 1990, c. B-16;

f) *Trustee Act*, R.S.O. 1990, c. T-23; and

g) *Negligence Act*, R.S.O. 1990, c. N-1.

234. As an investor in the Syndicated Mortgage, McDowell is representative of all other investors in the project.

235. McDowell brings this action on her own behalf and on behalf of all persons in Canada (the "**Class**") who were investors in the Syndicated Mortgage.

236. McDowell and the Class plead this action involves:

a) A breach of contract, tort and breach of fiduciary duty committed in the Province of Ontario; and

b) Damages arising in Ontario as a result of said actions.

Place of Trial

237. McDowell proposes that this action be tried at Toronto, Ontario.

DATE: March 29, 2019

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ARLENE MCDOWELL -and- FORTRESS REAL DEVELOPMENTS INC. ET AL.

Plaintiff Defendants

Court File No. CV-16-560268-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

FRESH AS AMENDED STATEMENT OF CLAIM

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